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In the Supreme Court of the United States

OCTOBER TERM, 1986

DOROTHY A. GRAHAM, AS THE EXECUTRIX OF THE
ESTATE OF JAMES M. GRAHAM, DECEASED, PETITIONER

v.

TELEDYNE-CONTINENTAL MOTORS, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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QUESTION PRESENTED

Whether the estate of an aircraft pilot involved in an air accident has any enforceable right to participate in or observe the air accident investigation of the National Transportation Safety Board.

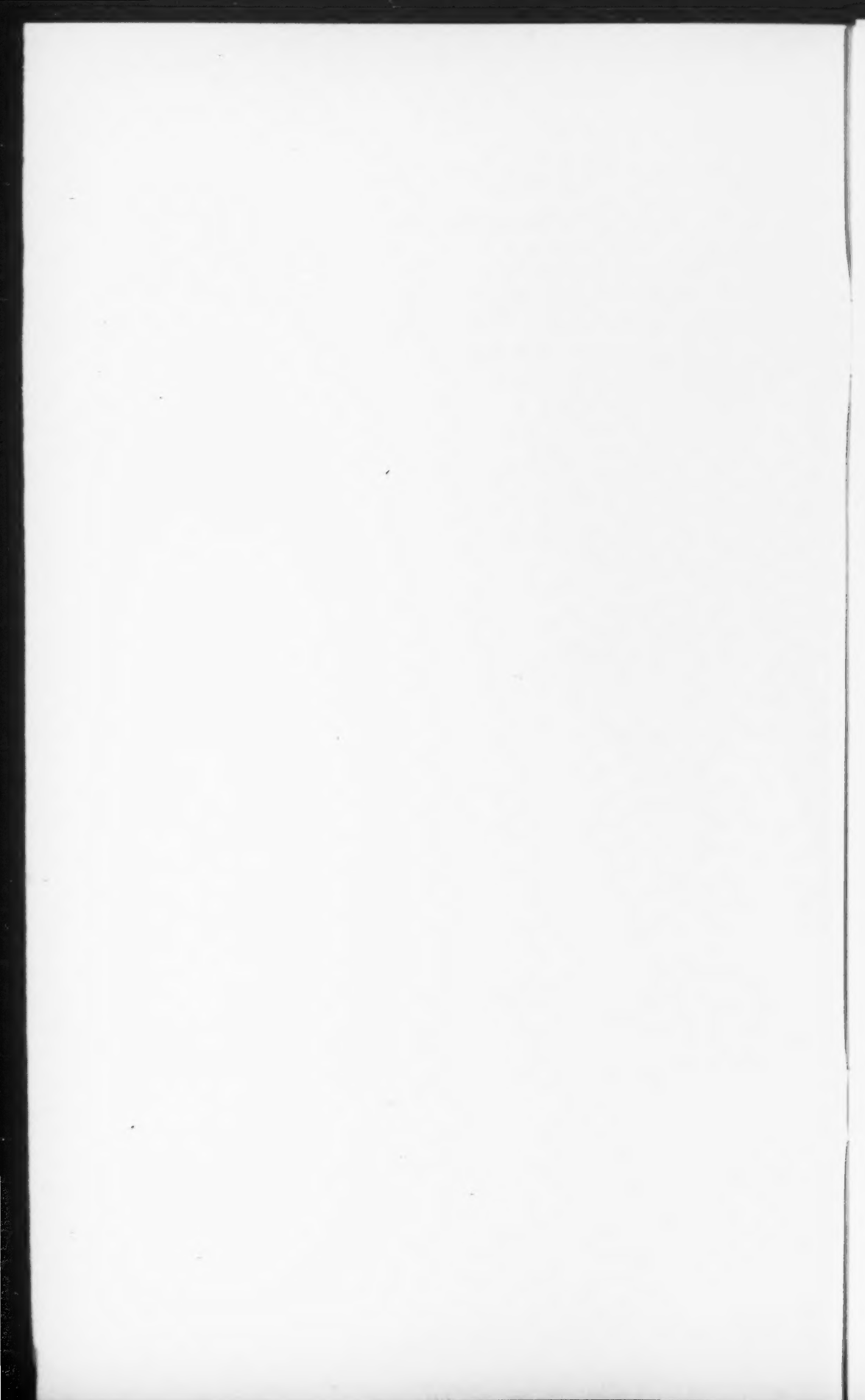


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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 805 F.2d 1386. The opinion of the district court (Pet. App. A10-A11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1986. A petition for rehearing was denied on February 11, 1987. The petition for a writ of certiorari was filed on April 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 23, 1985, a twin engine aircraft, piloted by one James M. Graham, crashed into a shopping mall in Concord, California, killing five persons, injuring several others, and causing extensive property damage (Pet. App. A1). Pursuant to its responsibilities under the Independent Safety Board Act of 1974, 49 U.S.C. App. (& Supp. III) 1901 *et seq.*, the National Transportation Safety Board (NTSB) immediately began an investigation into the cause of the accident (Pet. App. A2). In accordance with its standard practice, the NTSB directed that the aircraft's two engines be shipped to their manufacturer, Teledyne Industries, Inc. (Teledyne), so that they might be disassembled, inspected, and tested with a view to determining the cause of the crash (*ibid.*). The proposed inspection and disassembly were to be conducted by Teledyne engineers working in conjunction with, and under the supervision of, NTSB officials (*ibid.*).¹

On learning that the NTSB was shipping the engines to Teledyne for disassembly and testing, petitioner, the executrix of the pilot's estate, requested that her technical representative be allowed to participate in, or at least to observe, the teardown inspection by Teledyne and the NTSB (Pet. App. A2). Petitioner noted that she had been named as a defendant in several lawsuits arising from the December 23, 1985, crash, and expressed concern that the inspection would destroy or spoil critical evidence (*ibid.*). The NTSB and Teledyne refused petitioner's request (*ibid.*).

¹Because various aircraft engines have somewhat different designs and specifications, requiring different tools and techniques for disassembly, the NTSB has determined that using the facilities and personnel of an engine's manufacturer will maximize its ability to determine the cause of an accident while minimizing the cost of its investigation (Pet. App. A2 & n.1).

2. Petitioner initiated this action seeking to enjoin Teledyne and the NTSB from disassembling and testing the aircraft's engines without the participation of her technical representative (Pet. App. A2). She alleged that such an unobserved inspection would cause her irreparable harm, deprive her of due process by impairing her legal rights and remedies, and take her property without just compensation (*ibid.*). The district court denied her prayer for relief (*id.* at A10-A11). The court held that petitioner "had failed to establish [that] any constitutional right [] will be violated by the planned investigation," that she "ha[d] not established ownership of the aircraft engine in question," and that there "has been no taking of any claim or deprivation of any claim or defense she may have" (*id.* at A10). The court concluded that "the NTSB has the discretion pursuant to 49 U.S.C. App. 1903(b)(10) and 49 C.F.R. 831.9(a) and (c) to determine who shall be party to the investigation and, specifically the tear down, and it has not abused its discretion" (Pet. App. A11).

3. Pending resolution of petitioner's appeal, the Ninth Circuit enjoined Teledyne and the NTSB from disassembling, testing, or otherwise inspecting the engines without the participation of petitioner's technical representative (Pet. App. A3). On reaching the merits, however, the court rejected petitioner's various arguments (*id.* at A5-A9). It found that neither 49 C.F.R. 831.9(a) nor 49 C.F.R. 831.10(a) provides petitioner with an enforceable right to participate in a NTSB air accident investigation. The court pointed out that the former section, which allows the NTSB to designate parties to participate in investigations, "is written in the permissive" (Pet. App. A5), and that the latter section, which restricts access to wreckage to those persons who have been authorized by the NTSB to participate in such investigations, "is even less helpful to [petitioner]," since petitioner's representative never received authorization to participate in the investigation (*ibid.*). The court also

agreed with the district court that the NTSB had not "abuse[d] its discretion by deputizing Teledyne to participate in the investigation but refusing to accord [petitioner's] representative the same status," reasoning that "[t]he use of Tel[e]dyne's facilities and [experience] in disassembling its own engines could be indispensable in enabling the NTSB to carry out its mission," while "there is nothing unique [petitioner's] expert could add to the investigation, or so the NTSB could rationally decide" (*id.* at A6).

The court likewise found no merit in petitioner's constitutional claims. It rejected her contention (Pet. App. A7) that "her right to contribution or indemnity from others involved in the accident is a property right that will be impaired if [Teledyne and the NSTB] are allowed to conduct destructive testing," noting that, "[a]t most, [petitioner] may be deprived of certain evidence that could assist her litigation." "Courts have consistently rejected arguments that deprivation of evidence constitutes a denial of due process," the court observed, noting that "other avenues are open to [petitioner] to obtain substantially similar proof" (*id.* at A7, A8).² Finally, the court held that petitioner's takings claim was "premature" in view of the potential availability of a Tucker Act remedy (*id.* at A8-A9). The court accordingly ruled that the NTSB should be

²Specifically, the court noted (Pet. App. A8) that petitioner "will have access to the NTSB factual reports from the investigation," that petitioner "may secure the testimony of NTSB investigators concerning the factual information they gathered during the course of the accident investigation," and that petitioner "will presumably have access to the physical evidence itself after the engines have been released by the NTSB." It found unwarranted (*id.* at A8 n.9) petitioner's "concern that Teledyne may alter or destroy vital evidence," reasoning that "[t]he presumptions and sanctions available to punish those who alter or destroy evidence must be considered sufficient to deter any misconduct" and that, "[i]n any case, * * *, the engines will be handled by Teledyne employees only under the supervision of NTSB investigators."

allowed "to proceed with its investigation, unencumbered by concerns extraneous to—and inconsistent with—the important mission entrusted it by Congress"—(*id.* at A9).

4. The court of appeals denied a petition for rehearing and suggestion of rehearing en banc (Pet. 6). It likewise denied, on February 25, 1987, petitioner's motion for an emergency stay of the mandate pending the filing of a petition for a writ of certiorari (*ibid.*). Two similar motions to this Court were also denied (*id.* at 7). Accordingly, on April 13, 1987, the mandate of the court of appeals issued. The NTSB then resumed its investigation and completed the disassembly and inspection of the engines on or before May 18, 1987.

ARGUMENT

The decision below is correct. Moreover, as petitioner acknowledges (Pet. 7), the decision below is one of first impression and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner first claims (Pet. 10-14) that denying her the right to participate in the NTSB's disassembly and testing of the aircraft engines violates the Due Process Clause by assertedly rendering worthless her rights of action for indemnity or contribution from other parties in the collateral civil litigation. But even if one assumes that petitioner has a property interest in her causes-of-action for contribution or indemnity, she clearly suffers no deprivation of such property by being denied participation in the NTSB investigation. As the court below noted (Pet. App. A7), petitioner would at most be deprived of certain evidence that could possibly assist her in that civil litigation, and the deprivation of such potentially useful evidence does not violate the Fifth Amendment. See *Rosen v. NLRB*, 735 F.2d 564, 577 (D.C. Cir. 1984); *Samuelson v. Susen*, 576 F.2d 546, 553

(3d Cir. 1978). Moreover, as the court below also noted (Pet. App. A8), there is no reason to believe that petitioner will in fact be deprived of any significant evidence. The NTSB's factual report of its investigation will be available to her; she may secure the testimony of NTSB officials concerning the information that they gathered during the investigation; and she will have access to the physical evidence itself after the NTSB releases the engines. Thus, petitioner's interests, like the interests of the myriad other parties to such collateral civil litigation, are protected. See *Universal Air Lines v. Eastern Air Lines, Inc.*, 188 F.2d 993, 999-1000 (D.C. Cir. 1951); *Berquido v. Eastern Air Lines, Inc.*, 317 F.2d 628, 631-632 (3d Cir.), cert. denied, 375 U.S. 895 (1963); *Machin v. Zuckert*, 316 F.2d 336, 340 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).³

2. Petitioner further contends (Pet. 17-19) that the court below overlooked her interest as a supposed owner of the aircraft in rejecting her demand for participation in the NTSB's investigation. But, as the court of appeals noted (Pet. App. A6 n.6), petitioner failed to establish in the district court any rights of ownership in the airplane. See also *id.* at A10. In any event, the statutory provision on which petitioner relies, 49 U.S.C. App. 1903(b)(2), does not vest aircraft owners with any right to participate in NTSB investigations. This provision applies only to the NTSB's investigations of accidents that occur in surface transportation, not

³Petitioner similarly errs in suggesting (Pet. 15-16) that the NTSB's rules concerning the deputization of private parties to facilitate its investigations are invalid because not subjected to notice-and-comment rulemaking. To begin with, petitioner did not raise this argument in the court below and cannot properly raise it for the first time here. See *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-329 (1945) (per curiam). In any event, as the NTSB has publicly explained (49 Fed. Reg. 32852 (1984)), these rules concern agency practice and procedure and hence are exempt from APA rulemaking requirements under 5 U.S.C. 553(b).

air accidents.⁴ The authority applicable to NTSB air accident investigations, 49 U.S.C. 1441(g), contains no such language.⁵ And, contrary to petitioner's suggestion (Pet. 18-19), the NTSB's investigation manual does not require that petitioner's representative be allowed to participate in the investigation. Even if one assumes that this manual creates enforceable rights against the NTSB, which it obviously does not, the manual states only that persons who can usefully contribute to the investigation should be included. As the court of appeals noted (Pet. App. A6), "there is nothing unique [petitioner's] expert could add to the investigation, or so the NTSB could rationally decide."

3. For similar reasons, petitioner errs in suggesting (Pet. 19-22) that the NTSB has acted unlawfully by designating Teledyne as a participant in the investigation, while excluding petitioner. The NTSB's authorizing statute provides (49 U.S.C. App. 1903(a)(1)) that it shall "investigate or cause to be investigated (in such detail as it shall prescribe), and

⁴49 U.S.C. App. 1903(b)(2) provides, in pertinent part, that "[a]ny employee of the Board * * * is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation * * *. Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator * * * and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the investigation and with the cooperation of such owner or operator."

⁵49 C.F.R. 805.735-3(c), which petitioner cites (Pet. 21), merely states the standard of ethical and other conduct required of NTSB members and employees. It has no relevance to the question presented here concerning who is entitled to participate in NTSB accident investigations.

determine the facts, conditions, and circumstances and the cause or probable cause or causes of any * * * aircraft accident." As the court below noted (Pet. App. A6-A7), the NTSB's decision to designate Teledyne, while excluding petitioner, as a participant in the investigation clearly has a rational relationship to the achievement of this statutory responsibility. "The use of Tel[e]dyne's facilities and experience in disassembling its own engines could be indispensable in enabling the NTSB to carry out its mission," while the "only one connected with [petitioner] who might have had unique insight into what happened was James Graham, the pilot, who is dead" (*id.* at A7).

4. Finally, we note that, even if petitioner were to prevail before this Court, it is unclear whether the injunctive relief that she seeks would still be available to her. As of May 18, 1987, the NTSB completed its testing of the engines involved in this investigation and, accordingly, the process of disassembly and inspection in which petitioner seeks to participate can no longer be enjoined. While petitioner suggests (Pet. 6-7 n.1) that certain collateral issues remain (and therefore that this controversy is not moot), those issues clearly were not litigated in, and were not addressed by, the courts below. Thus, they are not ripe for presentation to the Court at this time, making the petition itself completely insubstantial.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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